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No. 95-1547

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

In the Matter of:
Penn Central Transportation Company

AMERICAN PREMIER UNDERWRITERS, INC.,
Petitioner,
v.
USX CORPORATION and BESSEMER and
LAKE ERIE RAILROAD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals correctly held, under Section 77 of the repealed Bankruptcy Act of 1898, that claims brought by the Bessemer and Lake Erie Railroad ("B&LE") against the former Penn Central Railroad for contribution and indemnity, which could not have arisen until commencement of the underlying federal and state antitrust suits against B&LE in the 1980s (when B&LE first had notice of its potential claims against Penn Central), were not discharged in the Penn Central reorganization proceedings consummated in 1978, there being no court of appeals decision to the contrary.

RULE 29.6 STATEMENT

Respondent USX Corporation has no parent companies and, with the exception of RMI Titanium Company (less than fifty percent of the voting shares of which are owned by USX Corporation), it has no nonwholly owned subsidiaries. The parent company of Respondent Bessemer and Lake Erie Railroad Company is Transtar, Inc. Respondent Bessemer and Lake Erie Railroad Company has no nonwholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents USX Corporation and Bessemer and Lake Erie Railroad Company ("B&LE") urge the Court to deny the petition for a writ of certiorari, which seeks review of a decision construing Section 77 of the Bankruptcy Act of 1898, formerly codified at 11 U.S.C. § 205 but repealed in 1978, as it applies to the reorganization in bankruptcy of Petitioner (then known as the Penn Central Transportation Company ("Penn Central")), which was consummated in 1978. The panel opinion of

the Court of Appeals (Pet. App. B) is reported at 71 F.3d 1113 (3d Cir. 1995).

SUMMARY OF ARGUMENT

This case plainly does not merit the Court's review for two fundamental reasons: (1) the issue presented involves interpretation of Section 77 of the former Bankruptcy Act of 1898, which was repealed nearly twenty years ago, is rarely applicable, and is significantly different in relevant respects from current law under the Bankruptcy Reform Act of 1978 (11 U.S.C. §§ 101 *et seq.*) (the "Bankruptcy Code"); and (2) the decision by the Third Circuit below does not conflict with any decision by another court of appeals.

Review of this case, arising under Section 77 of the former Bankruptcy Act, would likely have little if any impact on Bankruptcy Code cases. There are a number of important differences between the former Bankruptcy Act and the current Bankruptcy Code that relate to the issue presented in this case. For example, the Code has provisions addressing contingent contribution claims and future tort claims. The former Act did not have any such provisions. Moreover, the Bankruptcy Code provides a new definition of "claim" which Congress specifically intended to be broader than the definition of claim in the former Section 77. This case is therefore not an appropriate vehicle for resolving issues under the current Bankruptcy Code.

Despite Petitioner's misstatements, the decision below applied federal bankruptcy law (*not* a state statute of limitations) in holding that B&LE did not have contingent bankruptcy claims for contribution or indemnity against Penn Central. Counsel is unaware of any decision by any court of appeals finding a contingent bankruptcy claim for contribution or indemnity to have existed (under the repealed Bankruptcy Act or the current Bankruptcy Code) where the claimant lacked fair notice of the existence of such a claim. The Third Circuit did not

hold irrelevant, but rather rejected as factually baseless, Petitioner's contention that B&LE had fair notice of potential contribution or indemnity claims against Penn Central prior to consummation of the Penn Central reorganization—years before B&LE was first sued by any antitrust plaintiff.

Petitioner repeatedly but wrongly asserts that the Third Circuit held below that a bankruptcy claim "exists *only* when it accrues under the vagaries of varying state statute of limitations principles." (Pet. at i) (emphasis added). Passing over the artificiality of such issue on its face (Petitioner fails to specify any "varying state statute of limitations principles" operative in this case, and the variability of the substantive law underlying various types of claims is a necessary concomitant to bankruptcy law), the decisive point is that Petitioner simply misstates the decision below.

The Third Circuit looked to Section 77 of the former Bankruptcy Act in concluding that B&LE did not have a claim—within the meaning of that Act—for contribution or indemnity prior to consummation of the Penn Central reorganization in 1978. In so finding, the Third Circuit determined as a threshold matter that B&LE's cause of action for contribution or common law indemnity first "existed" (could be brought) once the underlying antitrust claims had been brought against B&LE in the 1980s, even though the cause of action had not yet accrued so as to trigger the statute of limitations (which would occur upon payment of the underlying antitrust liability). However, the non-existence of such a cause of action during the Penn Central reorganization became controlling only after the Third Circuit had determined under *federal bankruptcy law* that B&LE did not have a "contingent" bankruptcy claim for contribution or indemnity.

The decision by the Third Circuit below, holding that B&LE's claim for contribution or indemnity arose after Penn Central's reorganization and was not discharged

under the former Section 77, does not conflict with any decision by another court of appeals. Petitioner seeks to manufacture a conflict by baldly asserting as a factual matter that B&LE was "on notice" of potential contribution and indemnity claims against Penn Central prior to consummation of its reorganization. (Pet. at 15.) However, the Third Circuit expressly rejected Petitioner's factual premise, holding that B&LE "could not have been expected to file a contingent claim pre-consummation based on the speculative possibility that [its] conduct, which began in the 1950s, might have extended beyond the bounds of its statutory antitrust immunity and that [it] might successfully be sued years later." 71 F.3d at 1117. In an earlier case, the Third Circuit had held, consistently with other courts of appeals decisions cited by Petitioner, that contingent bankruptcy claims do arise when a potential claimant does in fact have "knowledge of them before confirmation of a reorganization plan," even though no cause of action yet exists. *In re Remington Rand Corp.*, 836 F.2d 825, 827 (3d Cir. 1988).

The Seventh Circuit is the only circuit court, besides the Third Circuit below, to consider whether a contribution or common law indemnity claim is discharged under Section 77 of the repealed Bankruptcy Act. Like the Third Circuit, and relying on Third Circuit precedent, the Seventh Circuit recently held that a contribution claim could not have been asserted or discharged in a railroad reorganization under the former Section 77 because the claimant could not have anticipated the underlying liability (arising under a state statute enacted after the reorganization). *See In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 3 F.3d 200 (7th Cir. 1993), *after remand*, 78 F.3d 285 (7th Cir. 1996). The other circuit court cases cited by Petitioner involve different types of claims, different statutory provisions, and different factual circumstances, and thus are readily reconciled with the decision below. No other court of appeals has rendered a decision in conflict with the decision below by the Third Circuit.

ARGUMENT

I. THIS CASE TURNS ON INTERPRETATION OF THE BANKRUPTCY ACT OF 1898, WHICH WAS REPEALED ALMOST TWENTY YEARS AGO AND DIFFERS SIGNIFICANTLY FROM THE CURRENT BANKRUPTCY CODE.

This case is governed by Section 77 of the former Bankruptcy Act of 1898, which was repealed in 1978—some eighteen years ago. Counsel is unaware of a single railroad reorganization case which is still pending under the former Act. Cases presenting issues under this repealed Act are rare. Moreover, as discussed below, there are a number of significant differences between the repealed Act and the current Bankruptcy Code which go to the heart of the issues presented in this case. Accordingly, despite Petitioner's urgings to the contrary, this case is a particularly "unsuitable vehicle" (Pet. at 18) for resolving any issues under the current Bankruptcy Code.

A. Section 502(e) of the Code: Contribution and Indemnity.

If an issue relating to bankruptcy claims for contribution or indemnity otherwise merited this Court's review, a case arising under the current Bankruptcy Code would be more suitable because in enacting the Code, Congress spoke directly to that subject. *See* 11 U.S.C. § 501(b), § 502(e), §§ 509-510. Under the Code, a bankruptcy court "shall disallow any claim for reimbursement or contribution . . . to the extent that . . . such claim . . . is contingent . . . ." 11 U.S.C. § 502(e)(1)(B). The Bankruptcy Code also requires that a claim for contribution or indemnity be disallowed to the extent the underlying claim is disallowed. 11 U.S.C. §502(e)(1)(A). No such provisions govern reorganizations under former Section 77.

B. Section 524(g) of the Code: Post-Petition Injury Caused by Pre-Petition Acts.

In holding that B&LE lacked any bankruptcy claim for contribution or indemnity against Penn Central, the Third Circuit relied upon its decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). In *Schweitzer*, the Third Circuit held that railroad workers exposed to asbestos prior to railroad reorganizations, but not manifesting any asbestos injury until thereafter, lacked bankruptcy claims which could be asserted or discharged in a reorganization under Section 77 of the former Bankruptcy Act.

In 1994, Congress enacted Section 524(g) of the Bankruptcy Code, which includes a provision that a demand for payment for asbestos injury manifesting itself only post-petition, although arising out of the "*same . . . conduct or events*" that gave rise to bankruptcy claims for *prepetition* asbestos injuries, is "*not a claim*" under the Bankruptcy Code. 11 U.S.C. § 524(g)(5) (emphasis added).[1] Section 524(g)(5) has no counterpart under Section 77 of the former Bankruptcy Act.

C. Section 101(5) of the Code: Definition of "Claim".

Even putting aside the specific Code provisions discussed above, Petitioner is still wrong in asserting that the "meaning of claim under Section 77, governing railroad reorganizations, . . . is essentially the same as in the Bankruptcy Code" under 11 U.S.C. § 101(5). (Pet. at 18-19 n.5). In enacting Section 101(4) of the Code (currently codified at 11 U.S.C. § 101(5)), Congress declared that it was an "even broader definition of claim than is found in the present debtor rehabilitation chapters."[2] *See Johnson v. Home State Bank*, 501 U.S. 78,

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[1] *See generally* H.R. Rep. No. 835, 103d Cong., 2d Sess. 40-41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3348-50.

[2] S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978); *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807-08; H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

86 (1991) (focusing upon the above-quoted legislative history). *See also In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995) ("[Section 77 of] the old Bankruptcy Act . . . used a narrower definition of 'claim' than the new Bankruptcy Code"). Indeed, the definition of "claim" under Section 77 of the former Bankruptcy Act which controls here—unlike the definitions of "claim" in other sections of the former Bankruptcy Act and in Section 101(5) of the Bankruptcy Code—did not even refer to "contingent" claims.[3]

At oral argument below, Petitioner itself urged that the definition of "claim" was *materially different* under Section 77 of the former Bankruptcy Act than under the Bankruptcy Code. Petitioner suggested that the Bankruptcy Code definition was somehow narrower, notwithstanding the express intent of Congress, in enacting the Code, to adopt the "broadest possible definition" of "claim."[4] In rejecting this strained argument, the Third Circuit observed that while its decision in *In re M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), involved the Code, rather than Section 77 of the Act, this was a "distinction without a difference" in the applicability of *Frenville*, given the breadth of the Code definition of "claim." 71 F.3d at 1117. Having recognized that the Bankruptcy Code definition of "claim" was at least as broad as the definition under former Section 77, it was simply unnecessary for the Third Circuit to go further and hold that the Code definition was in fact broader.

Petitioner likewise errs in asserting that the Third Circuit decisions in *Frenville*, *Schweitzer*, and *In re Penn*

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[3] *Compare* 11 U.S.C. § 205(b) (repealed 1978) *with* 11 U.S.C. § 506(1) (repealed 1978) *and* 11 U.S.C. § 101(5).

[4] S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808; H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

Cent. Transp. Co., 944 F.2d 164 (3d Cir. 1991) ("*Paoli Yard*"), *cert. denied*, 503 U.S. 906 (1992), "recognize[] no difference between reorganization under Section 77 of the Act or the Code as to the existence of a claim." (Pet. at 5). *Schweitzer* engaged in an in-depth analysis of the existence of a claim under Section 77 of the Act, just as *Frenville* carefully examined the meaning of a claim under the Bankruptcy Code. Neither court had any reason to examine other statutory provisions which did not apply. *Paoli Yard*, a Section 77 case, relied heavily on *Schweitzer*, and contains no reference to *Frenville*. Accordingly, the decision below, relying on *Schweitzer* and *Paoli Yard*, expressly noted that it had already addressed the issue of dischargeability in that Section 77 context. 71 F.3d at 1115. The Third Circuit explicitly held that while *Frenville* was supportive, it was "not necessary" to its decision below. *Id.* at 1117.

For all of the reasons discussed above, review of this Section 77 case under the repealed Bankruptcy Act would likely have little impact on the vast majority of bankruptcy cases, in view of the significant differences between Section 77 of the former Act and the current Code.

II. THIS CASE DOES NOT PRESENT ANY CONFLICT AMONG THE CIRCUITS.

In an effort to distract this Court from the narrow issue addressed by the court below, Petitioner attempts to create an impression that the Third Circuit rendered a decision of almost universal application to Bankruptcy Code cases. In fact, the Third Circuit engaged in a focused analysis of whether B&LE's contribution and common law indemnity claims arose post-consummation and, therefore, were not discharged under Section 77 of the former Bankruptcy Act. To assist it in its construction of the Section 77 definition of "claim," the court below reviewed six other Section 77 cases to align its decision with precedents regarding when a claim arises under the former

Bankruptcy Act.[5] In fact, the court relied almost exclusively on these Section 77 cases and cited only one Bankruptcy Code decision as further support which was "not necessary" to its holding. *See id.* at 1117 (citing *Frenville*). Thus, it is eminently clear that the decision below focuses solely on when a contribution or indemnity claim is discharged under the former Section 77, an issue addressed by only one other court of appeals (the Seventh Circuit)—which expressly *agreed* with the Third Circuit.[6]

A. Petitioner Misstates the Decision Below.

Petitioner repeatedly, but erroneously, asserts that the Third Circuit held below, and in other decisions, that "a claim exists" for federal bankruptcy purposes "*only* when it accrues under the vagaries of varying state statute of limitations principles." (Pet. at i) (emphasis added). (*See also id.* at 3, 5-7, 13-14.) To the contrary, the Third Circuit applied an analysis that is fully consistent with all of the arguably relevant decisions by other courts of appeals.[7]

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[5] *See* 71 F.3d at 1115-16 (relying on precedents set in *Schweitzer, supra; Paoli Yard, supra; In re Radio-Keith Orpheum Corp.*, 106 F.2d 22 (2d Cir.), *cert. denied*, 308 U.S. 622 (1939); *In re Reading Co.*, 404 F. Supp. 1249 (E.D. Pa. 1975); *In re Central R.R. Co.*, 950 F.2d 887 (3d Cir. 1991), *cert. denied*, 503 U.S. 971 (1992); and *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988)).

[6] *See* part II.B.1.a., *infra*.

[7] Moreover, while Petitioner refers to the supposed "vagaries of varying state statute of limitations principles" (Pet. at i), Petitioner fails to specify any such varying principles which are implicated in this case (involving claims for contribution and common law indemnity). Moreover, the variability of substantive law underlying various types of claims is a necessary incident of bankruptcy law, particularly "[s]ince most bankruptcy claims arise under substantive state law." (Pet. at 3.) *See Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946). *See also id.* at 171 (Frankfurter, J., concurring). Thus, the issue raised by Petitioner is artificial on its face.

Under the Third Circuit's analysis below, whether a claim had "accrued" for purposes of triggering the statute of limitations under nonbankruptcy law is simply and unassailably a *threshold* test for determining whether a claim existed for purposes of bankruptcy proceedings. *See* 71 F.3d at 1114-15 (citing *Schweitzer* and *Frenville*). As the Third Circuit observed in *Schweitzer*, it is "undisputed" that if a cause of action had accrued under the substantive nonbankruptcy law (which was federal law in that case, as in many other cases), then a claim must have existed for bankruptcy purposes. 758 F.2d at 941. But the Third Circuit explicitly did *not* hold the reverse, *i.e.*, that if no cause of action had accrued under nonbankruptcy law, then no bankruptcy claim could exist. *Id.* at 942-43.[8]

The second step in the Third Circuit's analysis of whether a bankruptcy claim existed is a determination of whether a cause of action could have been brought (even if it had not yet accrued so as to trigger the statute of limitations) under the relevant nonbankruptcy law. The Third Circuit concluded: "We agree with appellants that their claims for contribution and indemnity could not accrue until the MDL 587 complaints were filed against them." 71 F.3d at 1114-15.[9] In *Frenville*, which

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[8] *See also Paoli Yard*, 944 F.2d at 167 (summarizing *Schweitzer*); *In re Remington Rand Corp.*, 836 F.2d 825, 826, 831-32 (3d Cir. 1988) ("in drafting the [bankruptcy] Code to reach nearly every type of claim, Congress necessarily included" the "more traditional legal cause of action," but "we recognize that a party may have a bankruptcy claim and not possess a cause of action on that claim" (citing *Schweitzer*)); *Frenville*, 744 F.2d at 836-37 & n.8 (looking to state law only *after* concluding that no prepetition contingent claim existed under federal bankruptcy law, and only in the absence of any other "overriding federal policy" (such as may arise from a mass tort)).

[9] Indeed, contrary to Petitioner's suggestion, there is virtual *uniformity* under both federal and state law that a cause of action for contribution or indemnity arises at the time the triggering

involved applicability of the automatic stay, the Third Circuit did *not* hold, as Petitioner asserts, that bankruptcy claims for contribution and indemnity could not exist until, upon payment of the underlying tort claims, they had accrued for statute of limitations purposes. (Pet at 5-6). Rather, *Frenville* held that such contribution and indemnity claims were not cognizable in bankruptcy until the underlying tort claims had been brought, and the cause of action for contribution and indemnity first existed. 744 F.2d at 335-37. No court of appeals has ever held to the contrary.

The conclusion below that B&LE's cause of action for contribution and indemnity did not exist under nonbankruptcy law prior to consummation of the Penn Central reorganization "*frame[d] the issue*", which was "whether a claim that *arose after* the 1978 Consummation Order was *nevertheless discharged* by that order." 71 F.3d at 1115 (emphasis added). Referring to its decision in *Schweitzer*, the Third Circuit noted that it had "already answered that question in the negative, at least in the context of the § 77 reorganization presented by this case." *Id.* (footnote omitted).

The third step of the Third Circuit's analysis below was to determine whether B&LE had "pre-consummation, *contingent*, dischargeable claims" under the former Bankruptcy Act, as distinct from nonbankruptcy law. *Id.* (emphasis added). In this regard, the Third Circuit looked to its prior decisions in *Schweitzer* and *Paoli Yard*, and to a lesser extent *Frenville*, all of which expressly recognized that a contingent bankruptcy claim *could* exist even though a cause of action did not yet exist under nonbankruptcy law. *Id.* at 1115-17 & n.3.

The Third Circuit recognized in this regard that "one can have an 'interest' which is cognizable as a contingent

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complaint is served, at which point such cause of action may be asserted in a cross-claim or third-party complaint. *See, e.g.*, Fed. Rules Civ. P. 13(g), 14.

claim under Section 77," even though "there was no present cause of action" under nonbankruptcy law, provided that "one must have a legal relationship relevant to the purported interest from which that interest may flow." *Id.* at 1116 (quoting *Schweitzer*, 758 F.2d at 943). As an example, the court pointed to a parent company's guaranty of lease payments by its subsidiary, which was held to give rise to a cognizable claim by the landlord in the parent's bankruptcy even though the subsidiary had not yet defaulted on the lease payments. 71 F.3d at 1116 (citing *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22 (2d Cir.), *cert. denied*, 308 U.S. 622 (1939)). Similarly, the Third Circuit recognized that a "classic" contingent bankruptcy claim arises at the moment when "parties agree in advance that one party will indemnify the other party in the event of a certain occurrence," even though no cause of action for indemnity arises under nonbankruptcy law unless and until the indemnified occurrence takes place. 71 F.3d at 1116 n.3 (quoting *Frenville*, 744 F.2d at 336-37).

In its decision below, the Third Circuit properly rejected Penn Central's contention that, like a guaranty or indemnity contract, the railroads' rate bureau agreement —approved by the Interstate Commerce Commission for purposes of antitrust immunity for collective ratemaking under former Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b (1976))—constituted the type of pre-bankruptcy legal relationship that gave rise to contingent bankruptcy claims for contribution and indemnity. In the words of the Third Circuit:

> [T]he § 5a agreement confers no right of indemnification. That agreement, although the source of [B&LE's] primary liability to the MDL 587 plaintiffs, simply does not evidence an intent to look to the pre-reorganized Penn Central for contribution or indemnity claims. Put simply, although there was a legal relationship between the Bessemer and the Penn

> Central's predecessors, there was no legal relationship from which a prepetition interest in contribution or indemnity could flow. . . .
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> * * * *
>
> In *Paoli Yard*, we made explicit what was implicit in *Schweitzer*: it is not sufficient for dischargeability purposes that there was *some* pre-consummation legal relationship between the debtor and the party seeking now to assert a claim; rather, that relationship must be relevant to the claimant's cause of action.

71 F.3d at 1116-17 (emphasis in original). Thus, the decision below plainly does not, as Petitioner wrongly asserts, "remove[] th[e] category of [contingent] claims from bankruptcy law." (Pet. at 11.) The Third Circuit simply recognized that on the facts presented, Respondents' contribution and indemnity claims did not fall within that category.

Petitioner also erroneously assumes, as established fact, that at the time of the bankruptcy proceedings, B&LE "should fairly have contemplated such possible future claims" (Pet. at i), and was "on notice that it might have indemnity and contribution claims in the future." (Pet. at 15.) On this faulty factual premise, Petitioner wrongly asserts that the decision below conflicts with decisions by other courts of appeals which have recognized contingent claims in bankruptcy where claimants had ample notice that such claims might arise in the future. (*See id.* at i, 3-4, 14-15.)

To the contrary, the Third Circuit expressly *rejected* Petitioner's factual premise that B&LE was on fair notice of its contribution and indemnity claims prior to being sued by the antitrust plaintiffs, and prior to consummation of the Penn Central reorganization. The Third Circuit correctly held that B&LE "could *not* have been expected to file a contingent claim pre-consummation based on the speculative possibility that [its] conduct, which began in the 1950s, might have extended beyond the

bounds of its statutory antitrust immunity and that [it] might successfully be sued years later." 71 F.3d at 1117 (emphasis added). There is no reason to review this factual holding.[10]

The Third Circuit further observed in this regard that if B&LE were required to act with such "clairvoyance," then countless other entities that did business with Penn Central would also have been required to file "contingent claims," the resolution of which would have been "impossible," and the "uncertainty thus created" would render any reorganization plan "unworkable." 71 F.3d at 1117-18. There is no basis for Petitioner's naked contention that other courts of appeals would have concluded otherwise.

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[10] Indeed, in denying prejudgment interest in the antitrust case, the Third Circuit "agree[d] with the district court that B&LE had a reasonable expectation [even after it was sued] that it would not be liable to the plaintiffs." *In re Lower Lake Erie Iron Ore Antitrust Litig. (MDL-587)*, 998 F.2d 1144, 1181 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 921 (1994). The district court found that "very little of [the evidence] related to the defendant B&LE," and that there was a "legitimate argument that, regardless of the improprieties which may have been committed by the other defendants, the B&LE was not guilty of anti-competitive conduct." 759 F. Supp. 219, 234 (E.D. Pa. 1991). Moreover, in holding that the antitrust claims against Penn Central had been discharged, the reorganization court found no basis for concluding that Penn Central should have been aware of potential antitrust liability during its reorganization. *In re Penn Central Transp. Co.*, 42 B.R. 657, 666 (Bankr. E.D. Pa. 1984), *aff'd*, 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985). The very same conduct that gave rise to antitrust liability in MDL-587 had previously been held by the Sixth Circuit to be immune from antitrust damage liability, based both on express statutory antitrust immunity as well as the filed rate doctrine of *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156 (1922). *See Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1455-60 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

B. No Other Court of Appeals Has Reached a Different Result on Similar Facts.

Prior to this case, the Third Circuit had held—no less than the courts of appeals cited by Petitioner—that contingent claims arise under the Bankruptcy Code (even though no cause of action then exists under nonbankruptcy law) when the claimant "has *knowledge* of them before confirmation of a reorganization plan." *In re Remington Rand Corp.*, 836 F.2d 825, 827 (3d Cir. 1988) (emphasis added). The Third Circuit explained that "[o]nly then would the parties' 'legal relationship,' *see Schweitzer* . . ., be such that [a party] would be in a position to determine and assert [a contingent claim]." *Id.* at 833 n.7.

Finding such knowledge, the Third Circuit held in *Remington* that a contingent bankruptcy claim for breach of contract did exist, although no cause of action existed or accrued under nonbankruptcy law until after the reorganization. By the same token, the absence of such knowledge was central to the Third Circuit's determina- knowledge under bankruptcy law that no contingent tort claims had existed in *Schweitzer*,[11] and that no contingent CERCLA claims had existed in *Paoli Yard*.[12]

Thus, as elaborated below, there is no real confiict between the Third Circuit and other courts. of appeals

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[11] In *Schweitzer*, the Court assumed that although plaintiffs had been exposed to asbestos while working for railroads prior to their reorganization, no resultant injury had manifested itself until after the reorganizations. The Court concluded that it would be "absurd . . . to have expected plaintiffs, who allegedly had manifested no injury at the time of the reorganization proceedings, to file claims for such injury in those proceedings." 758 F.2d at 943.

[12] *Paoli Yard* involved contribution claims as well as direct claims under CERCLA which the claimants could not have anticipated because CERCLA was not enacted by Congress until after the railroad reorganization. The Third Circuit accordingly viewed the case as closely analogous to *Schweitzer*. *See* 944 F.2d at 167-68.

as to the legal standards for determining when "a contingent bankruptcy claim arises." At bottom, the different results in different cases upon which Petitioner seizes simply reflect the different factual contexts (and procedural postures) of the cases. There is no basis for concluding that any other court of appeals would have decided this case differently.

1. *The Seventh Circuit.*

a. *Milwaukee Road II.*

It is noteworthy that Petitioner ignores the one court of appeals decision outside the Third Circuit which addresses an issue similar to the one presented here—and reaches the same result as did the Third Circuit. *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 3 F.3d 200 (7th Cir. 1993), *after remand*, 78 F.3d 285, 1996 U.S. App. LEXIS 3328 (7th Cir. 1996) ("*Milwaukee Road II*"). That case, like this one, involved the issue of whether a contingent bankruptcy claim for contribution had existed and was discharged in a railroad reorganization under Section 77 of the repealed Bankruptcy Act. The Seventh Circuit "joined other courts, *e.g.*, the . . . Third Circuit" in holding that the contribution claim had not been discharged because claimant could not have anticipated the underlying liability (based on a state environmental clean-up statute enacted after the reorganization). 1996 U.S. App. LEXIS at *4 (citing *Paoli Yard*). *See also* 3 F.3d at 205 (claimant "could not possibly have known of its liability" (quoting the district court)). It is therefore clear that the Seventh Circuit is not at odds with the Third Circuit decision in this case.

b. *Milwaukee Road I.*

Only one of the decisions which Petitioner cites as in conflict with the decision below involved Section 77 of the former Bankruptcy Act, rather than the current Bankruptcy Code. That decision, *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775 (7th

Cir. 1992) ("*Milwaukee Road I*"), is by no means "squarely in conflict" with the decision below. (Pet. at 13.) Indeed, *Milwaukee Road I* followed the analytic approach of the Third Circuit by considering both whether a cause of action existed under nonbankruptcy law and whether a contingent claim existed under bankruptcy law.[13]

The Seventh Circuit held in *Milwaukee Road I* that when a potential claimant under CERCLA became aware that the debtor was responsible for hazardous substance contamination, and received preliminary soil test results, a contingent CERCLA claim arose.[14] As explained above, the Third Circuit did not take a contrary position below, but rather simply concluded that B&LE lacked any fair notice of its potential contribution and indemnity claims against Penn Central until years after consummation of the Penn Central reorganization, when B&LE itself was first sued by the antitrust plaintiffs.

In undertaking an extensive review of relevant case law in *Milwaukee Road I*, including the Third Circuit decisions in *Schweitzer* and *Paoli Yard*, the Seventh Cir-

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[13] *See* 974 F.2d at 780-81 ("It is clear that a cause of action constitutes a claim under Section 77," but "a party may have [a] preconsummation 'contingent claim' . . . under Section 77 even before the party has a cause of action" (citing *Schweitzer*)). *See also id.* at 785 ("We agree that CERCLA is the *starting point* for determining when a CERCLA claim arises in a Section 77 bankruptcy," but "the fact that response costs are necessary for an actual claim to accrue under CERCLA does not necessarily mean that such costs are necessary for a contingent CERCLA claim to accrue under Section 77" (emphasis added)).

[14] "[W]hen a potential CERCLA claimant can *tie* the bankruptcy debtor to a *known* release of a hazardous substance which this potential claimant *knows* will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted *tests* with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim for purposes of Section 77." 974 F.2d at 786 (emphasis added). *See also Milwaukee Road II*, 3 F.3d at 203-07 (similar result reached by the Seventh Circuit on similar facts).

cuit never suggested any conflict with Third Circuit law. Rather, the Seventh Circuit observed that the law was evolving *harmoniously*, pointing out that the "determination of when a party has a claim or contingent claim seems to hinge"—appropriately so—"on the nature of the claim and the posture of the case." 974 F.2d at 781.

In respect of the "nature of the claim," the Seventh Circuit did not quarrel with the proposition drawn from *Schweitzer* that "this differential treatment is justified for several reasons, one being that a tort claimant, unlike the contractual claimant, is *not always aware* that it has a legal relationship with the debtor which gives rise to the claim until years after the tortious act." *Id.* (emphasis added).

In respect of the "posture of the case," the Seventh Circuit distinguished two scenarios: one in which a party first acquires knowledge of its claim against the debtor *during* the bankruptcy proceedings, and one in which such knowledge is first acquired *after* the bankruptcy proceedings. *Id.* at 782. As to the first scenario, the Seventh Circuit recognized policy reasons (particularly under the current Bankruptcy Code rather than the former Bankruptcy Act) for finding that bankruptcy claims existed at an earlier point in time (there being little or no justification for allowing a knowledgeable claimant to evade an ongoing bankruptcy process and seek treatment superior to similarly situated creditors). *Id.* at 781-83.

As to the second scenario, however, the Seventh Circuit observed—consistently with *Schweitzer, Paoli Yard,* and the decision below—that "the equities arguably run the other way." *Id.* at 782. If a party "did not know" until after the bankruptcy proceedings that it had a bankruptcy claim, it would be "forever barred from raising this claim against the individual debtor, reorganized company, or its successors," without ever having a realistic opportunity to assert its claim. *Id.* (citing *Schweitzer*). In this scenario, the Seventh Circuit saw "no reason . . .

to adopt a standard which has the potential of cutting off future creditors' claims even though these creditors had no reason to know" of their bankruptcy claims. *Id.* at 784. As the Seventh Circuit recognized in *Milwaukee Road I*, and as demonstrated below, any apparent "divergence" in the standards employed by the courts in this regard may well be "attributable to the varied posture of these cases" rather than to any real or lasting conflict. *Id.* at 783.

2. *The Ninth Circuit.*

Groping to find a conflict among courts of appeals, Petitioner also relies upon *In re Jensen*, 995 F.2d 925 (9th Cir. 1993). (*See* Pet. at 13-14). However, *Jensen* involved facts similar to those presented in *Milwaukee Road I*, and reached a similar result.[15] *Jensen* no more conflicts with the decision below than does *Milwaukee Road I*, which was approved in *Jensen*. 995 F.2d at 930-31. The Ninth Circuit in *Jensen* also discussed—but did not quarrel with—the Third Circuit decisions relied upon below, *Schweitzer* and *Paoli Yard*, which were perceived by the Ninth Circuit as the most relevant Third Circuit authorities on whether contingent bankruptcy claims had arisen and were discharged. *Id.* at 929.

3. *The Fourth Circuit.*

a. *The* Grady *Case.*

Neither the Third Circuit's decision in this case, nor the *Schweitzer* decision upon which it relies, conflicts with *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988). Both *Schweitzer* and the decision below involved the dischargeability of post-reorganization claims under the former Bankruptcy

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[15] "We conclude that the state had sufficient knowledge of the Jensens' potential liability to give rise to a contingent claim for cleanup costs before the Jensens filed their personal bankruptcy petition. . . ." *Id.* at 931.

Act, rather than ongoing proceedings under the current Bankruptcy Code, as in *Grady*.[16] The Fourth Circuit itself "emphasize[d] the narrowness" of its holding in *Grady*, which reached only the applicability of the automatic stay to the "claim in the case before us," and not the priority or dischargeability of that claim. 839 F.2d at 199, 203. Further, the Fourth Circuit repeatedly stressed that its holding in *Grady* was anchored in the language and legislative history of the current Bankruptcy Code. *Id.* at 200, 202-03.

b. *The* Butler *Case.*

Petitioner is also wrong in asserting a conflict between the decision below and the decision in *Butler v. NationsBank, N.A.*, 58 F.3d 1022 (4th Cir. 1995). (Pet. at 11-12). *Butler* is unlike any of the cases discussed above in that all of the elements of the bank's tort cause of action against the debtor indisputably existed pre-petition, when the debtor deposited a fraudulently endorsed check with the bank and the bank credited the debtor's account based on the forgery. 58 F.3d at 1029. The Fourth Circuit rejected the bank's contention that its claim did not arise until it received post-petition notice of the forgery.

Far from creating any conflict with Third Circuit bankruptcy cases, the *Butler* case is analogous to the Third Circuit decision *In re Penn Cent. Transp. Co.*, 771

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[16] The Seventh Circuit suggested in *Milwaugee Road I* that the holding affirmed in *Grady* is confined to *ongoing* proceedings under the *Code*—a context in which that holding is arguably both necessary to reorganization and fair to claimants against the debtor—and could not properly be extended to cases (as here) involving consummated proceedings under the former Act. 974 F.2d at 781-84. Unlike the present case or the *Schweitzer* case, the bankruptcy court in *Grady* had established a class of "Future Tort Claimants," consisting of virtually all users of the debtor's defective contraceptive device, the Dalkon Shield, and they were each notified that they may have bankruptcy claims if and when they became aware of resultant injury. *Grady*, 839 F.2d at 202.

F.2d 762 (3d Cir.) ("*Pinney Dock*"), *cert. denied*, 474 U.S. 1033 (1985). In *Paoli Yard*, the Third Circuit rejected a contention that *Pinney Dock* was inconsistent with its decisions in *Schweitzer* or *Paoli Yard*, explaining:

> In *Pinney Dock*, a party was refused permission to pursue an antitrust claim against [Penn Central] for alleged violations committed by [Penn Central] before the bankruptcy proceedings but apparently *not discovered* by the putative claimant until after the reorganization had been consummated. . . . The difference between *Pinney Dock* and the appeal before us is simply that in *Pinney Dock all of the factual and legal elements of the plaintiff's claim existed* prior to the consummation of the [Penn Central] bankruptcy.

944 F.2d at 168 (emphasis added). Consistent with *Butler*, the Third Circuit held in *Pinney Dock* that the unasserted claim had been discharged (finding no basis for relief on grounds of fraudulent concealment of the claim or inadequate notice of the bankruptcy proceedings). *Butler* is no less consistent with Third Circuit jurisprudence than is the analogous *Pinney Dock* case.

C. The Courts of Appeals Are Developing a Consistent Approach to the Type of Issues Presented Here.

It is at best a gross overstatement for Petitioner to assert that courts of appeals have adopted "myriad, divergent approaches" which result in "materially different determinations" as to whether contingent bankruptcy claims exist. (Pet. at i, 17.) To the contrary, a consistent approach is evolving. To date, there have been no "materially different determinations" by courts of appeals in similar factual and procedural contexts.

1. *Emerging Consensus on the "Fair Notice" Standard.*

The courts of appeals are in basic accord that a contingent bankruptcy claim may exist when, based upon a rele-

vant prebankruptcy relationship between the claimant and the debtor, the claimant is on fair notice of a potential claim against the debtor. *See, e.g., In re Remington Rand Corp.*, 836 F.2d at 827, 833 n.7 (Third Circuit: "sufficient knowledge to assert a potential claim" based on the parties' " 'legal relationship' " (citing *Schweitzer*)); *Milwaukee Road I*, 974 F.2d at 786 (Seventh Circuit: "when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs"); *In re Jensen*, 995 F.2d at 930 (Ninth Circuit: " 'fair contemplation' test").

In each of those cases, claims asserted post-bankruptcy based on the prebankruptcy conduct of the formerly insolvent debtor were barred because, despite fair notice that the claims would likely ripen, claimants had failed to asesrt them as contingent bankruptcy claims. By contrast, in cases such as *Schweitzer, Paoli Yard,* and *Milwaukee II*, and in this case, where claimants lacked fair notice of such claims until after the bankruptcy proceedings, they were allowed to assert them against the reorganized companies.

2. *The So-Called "Conduct Test" Has Been Adopted Only in a Narrow Setting.*

Contrary to Petitioner's presentation (Pet. at 15-17), only *one* other approach has been adopted—tentatively—by a court of appeals, and only in a narrow context (wholly unrelated to the circumstances presented in this case) that makes it consistent with the "fair notice" approach. In the *Grady* case, the Fourth Circuit confronted *prospectively*—in ongoing bankruptcy proceedings—the type of dilemma that the Third Circuit in *Schweitzer* could address only retrospectively: that numerous victims of the debtor's mass tort (*i.e.*, the manufacture and sale of the defective Dalkon Shield in *Grady*; asbestos exposure in *Schweitzer*) would suffer manifest injury only

after commencement or completion of the bankruptcy proceedings.

Accordingly, the Fourth Circuit in *Grady* undertook to preserve the possibility (not available in *Schweitzer*) of an equitable resolution of *all* of the mass tort claims in the bankruptcy proceedings (where a class of Future Tort Claimants had been established), thereby promoting the debtor's reorganization consistently with fairness to claimants. Importantly, the future tort claimants in *Grady* were given actual, court-approved notice of their potential claims at the time of the bankruptcy proceedings, and were therefore positioned to seek compensation for Dalkon Shield injuries in those proceedings.

Nonetheless, the holding in *Grady* was narrow and tentative. The Fourth Circuit simply applied the automatic stay to "the Dalkon Shield claim in the case before us." 839 F.2d at 203. Significantly, the Fourth Circuit "emphasize[d] . . . that we do *not* decide whether or not Mrs. Grady's claim or those of the Future Tort Claimants are *dischargeable* in this case." *Id.* (emphasis added). Petitioner cites no other court of appeals decision applying the so-called "conduct test" (Pet. at 15-16),[17] nor any court of appeals decision rejecting it in a factual and procedural context similar to that presented in *Grady*.[18]

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[17] *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), simply held that the EPA had contingent bankruptcy claims for recovery of its post-petition costs of cleaning up hazardous substances released by the debtor pre-petition, where the EPA had in fact filed claims for costs incurred prepetition (and the debtor had listed contingent liabilities for post-petition costs) in the debtor's ongoing bankruptcy proceeding. In view of EPA's knowledge of its imminent claims (*id.* at 1005), the Second Circuit saw no need to decide whether prepetition conduct that had not resulted in manifest injury could give rise to contingent bankruptcy claims. The Court observed, however, that adoption of such a "conduct test" would lead to "questionable results" and put "considerable strain . . . on the Code's definition of 'claim.'" *Id.* at 1003-04.

[18] The Third Circuit in *Schweitzer* appears to have left open the possibility that it might consider such an approach in such circum-

3. *"Pre-Petition Relationship Test" Is Not a Separate Approach.*

Contrary to Petitioner's suggestion, the so-called "pre-petition relationship test" is not a "divergent approach" to determining the existence of a contingent bankruptcy claim. (Pet. at 15-17) (citing *Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573 (11th Cir. 1995) ("*Piper*")). Rather, as recognized in *Piper*, a relevant prepetition relationship is simply a "threshold" component of the approach taken in *Grady* as well as the approach adopted in other cases discussed above. *Piper*, 58 F.3d at 1577-78 (citing, *inter alia*, *Grady*, 839 F.2d at 203; *In re Jensen*, 995 F.2d at 929-31; *In re Chateaugay*, 944 F.2d at 1003-04). In *Piper*, the Eleventh Circuit simply held that a class of "Future Claimants" who might be injured in the future as a result of unknown defects in aircraft manufactured and sold by the debtor, but who presently lacked any relevant relationship with the debtor (such as ownership of a plane made by the debtor), did not have bankruptcy claims against the debtor.

4. *Summary.*

No truly "divergent" approach—much less any clear conflict among circuits—has emerged which would warrant this Court's review. Moreover, this case—involving a long-consummated reorganization under the repealed Bankruptcy Act of 1898—would not in any event serve as an appropriate vehicle for the Court to address issues at the forefront of current bankruptcy law involving mass torts or environmental clean-up costs.

The courts of appeals have already struck (or are in the process of developing) a careful balance between the

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stances. *See* 758 F.2d at 944 n.1 ("Because this case does not present the question of what provision in a reorganization plan, if any, could be made for future claims such as these (*e.g.*, reserve or sinking funds, insurance, annuities, etc.), we do not address that issue here").

competing bankruptcy policies of "maximizing the creditor's interests in receiving payment and the debtor's interest in a fresh start." *Milwaukee Road I*, 974 F.2d at 779. The decision below is consistent with that balance. It is consistent as well with Petitioner's position that a contingent bankruptcy claim should exist only "if the claimant has a reasonable basis to anticipate that such claim may arise in the future." (Pet. at 4). The Third Circuit recognized in this case that B&LE lacked any such reasonable basis. The court of appeals simply held that because B&LE had no claim for contribution or indemnity prior to consummation of the Penn Central reorganization in 1978, its present claims could not have been discharged in the reorganization proceedings.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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